



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 13, 2010

Ms. Anne M. Constantine
Legal Counsel
Dallas/Fort Worth International Airport
P.O. Box 619428
DFW Airport, Texas 75261-9428

OR2010-13856

Dear Ms. Constantine:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 393273.

The Dallas/Fort Worth International Airport Board (the "board") received a request for the contract and related documentation between the board and Clean Energy Fuels ("Clean Energy") concerning solicitation number 7005231, Rental Car Center Compressed Natural Gas Fueling Station, and the proposal submitted by Clean Energy for this solicitation. You state you are in the process of releasing some of the requested information. Although you raise no exceptions to disclosure of the requested information, you state release of this information may implicate the proprietary interests of a third party. You inform us that pursuant to section 552.305 of the Government Code, the board has notified Clean Energy of the request and of its right to submit arguments to this office explaining why its information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received arguments from Clean Energy. We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address the board's obligations under the Act. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301 of the Government Code provides in relevant part:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the exceptions [to disclosure] must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

...

(e) A governmental body that requests an attorney general decision under Subsection (a) must within a reasonable time but not later than the 15th business day after the date of receiving the written request:

(1) submit to the attorney general:

(A) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld;

(B) a copy of the written request for information;

(C) a signed statement as to the date on which the written request for information was received by the governmental body or evidence sufficient to establish that date; and

(D) a copy of the specific information requested, or submit representative samples of the information if a voluminous amount of information was requested[.]

Gov't Code § 552.301(a), (b), (e). In this instance, the board received the request for information on March 4, 2010. Thus, it was the board's obligation under the Act to submit a request for a ruling to this office by March 18, 2010. However, you did not request a ruling from this office or submit the information at issue until July 9, 2010 after the board received a follow-up request from the requestor on June 30, 2010. Consequently, we conclude that

the board failed to comply with the procedural requirements of section 552.301 in requesting a decision from our office.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of the Act results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). The presumption that information is public under section 552.302 can be overcome by demonstrating that the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Because third party interests are at stake in this instance and can provide compelling reasons to withhold information, we will consider whether or not any of the submitted information is excepted from disclosure under the Act.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Clean Energy raises section 552.101 in conjunction with the federal Freedom of Information Act ("FOIA") for the submitted Affirmative Action Plan. *See* 5 U.S.C. § 552. We note, however, that FOIA is applicable to information held by an agency of the federal government. In this instance, the information at issue was created for and is maintained by the board, which is subject to the state laws of Texas. *See* Attorney General Opinion MW-95 (1979) (FOIA exceptions apply to federal agencies, not to state agencies); Open Records Decision Nos. 496 (1988), 124 (1976); *see also* Open Records Decision No. 561 at 7 n 3 (1990) (noting that federal authorities may apply confidentiality principles found in FOIA differently from way in which such principles are applied under Texas open records law); *Davidson v. Georgia*, 622 F.2d 895, 897 (5th Cir. 1980) (state governments are not subject to FOIA). Accordingly, the board may not withhold the submitted information under section 552.101 in conjunction with FOIA.

Clean Energy also raises the federal Trade Secrets Act, section 1905 of title 18 of the United States Code, in conjunction with section 552.101 of the Government Code. The Trade Secrets Act provides in pertinent part:

[w]hoever, being an officer or employee of the United States or of any department or agency thereof, any person acting on behalf of the Federal Housing Finance Agency, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311-1314), or being an employee of a private sector organization who is or was assigned to an agency under chapter 37 of title 5, publishes, divulges, discloses, or makes known in any

manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.

18 U.S.C. § 1905 (2008). By its terms, this statute pertains only to employees and agents of the federal government. State employees who are assigned to federal government agencies in some circumstances may be deemed federal employees for certain purposes. 5 U.S.C. § 3374 (2001). However, in this case there is no indication of such an assignment pertinent to the responsive information. The federal courts have held that no basis exists to justify transforming officers and employees of state agencies into federal officers and employees for purposes of the Trade Secrets Act. *St. Michael's Convalescent Hospital v. State of Cal.*, 643 F.2d 1369 (9th Cir. 1981). We conclude that the Trade Secrets Act does not prohibit the board from disclosing the requested information. Therefore, the information at issue is not excepted from public disclosure under section 552.101 of the Government Code in conjunction with the Trade Secrets Act.

Clean Energy also raises section 552.110 of the Government Code for its submitted information. Section 552.110 protects (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b).

Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 (1990). Section 757 provides that a trade secret is:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the

business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Huffines*, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.¹ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm).

¹The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Clean Energy claims portions of its information are excepted from disclosure under section 552.110(a) of the Government Code. Having reviewed Clean Energy's arguments, we find it has made a *prima facie* case that some of its information constitutes trade secrets. Thus, the board must withhold the information we have marked in Clean Energy's proposal under section 552.110(a) of the Government Code. However, the remaining information at issue reflects it was tailored for this particular bid proposal. We note that information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3, 306 at 3. Upon review of the submitted arguments, we conclude Clean Energy has failed to demonstrate that any of the remaining information it seeks to withhold meets the definition of a trade secret, nor has Clean Energy demonstrated the necessary factors to establish a trade secret claim for this information. Therefore, the board may not withhold any of the remaining information at issue under section 552.110(a) of the Government Code.

Upon review, we find that Clean Energy has made only conclusory allegations that release of the remaining information at issue would cause the company substantial competitive injury. *See* ORD 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show specific factual evidence that substantial competitive injury would result from release of particular information at issue); *see also* ORD 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Furthermore, we note that pricing information of a winning bidder, as Clean Energy is in this case, is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a company contracting with a governmental body is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Accordingly, the board may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

In summary, the board must withhold the information we have marked under section 552.110(a) of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Andrea L. Caldwell
Assistant Attorney General
Open Records Division

ALC/eeg

Ref: ID# 393273

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Katheryn M. Klein
Clean Energy
3020 Old Branch Parkway, Suite 400
Seal Beach, California 90740
(w/o enclosures)